FILE COPY

IN THE

Supreme Court of the United States

October Term, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al.,
Appellees.

APPELLEES' BRIEF

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Statement of the Case

The statement of the case as made by appellant is only partially correct.

It starts out with statements purporting to describe the order of the Commission. But it should be noted that this description is but a repetition of the allegations of appellants' complaint filed in the Court below.

Those allegations have not yet been established, and at the proper time and place they will be controverted by answer.

The right to do so was expressly reserved at the hearing in the Court below. (R. 39-40).

We do not now and did not in the Court below concede that those allegations can be sustained. We are prepared to defend the order in question at the proper time and place.

The only question presented to the Court below and the only question here involved is one of jurisdiction. In what Court must appellants go to attempt to establish the extravagant allegations made in the complaint? That is the sole question here involved.

ARGUMENT

It is our contention sustained by the court below (12 Fed. Supp. 946) that the Federal Court was and is without jurisdiction by reason of the Act of Congress of May 14, 1934, reading:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political sub-division thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates, chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."
>
> U.S.C.A. Title 28, Sec. 41 (1).

I.

(A) Remedy in the State Courts

The Montana Statutes provide for a judicial review of rate orders made by the Montana Public Service Commission.

Section 3906 R. C. 1921 in part provides:

> "Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable."

That section further provides:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having first been given and hearing having been had thereon; provided, that all rates fixed by the commission shall be deemed reasonable and just, and shall remain in full force and effect until final determination by the courts having jurisdiction."

It is the last quoted proviso of this statute upon which appellant stands. In effect appellant contends that the remedy provided for by Section 3906 is not efficient since under the terms of the statute the order cannot be enjoined pendente lite.

(B) Sec. 3906 Unconstitutional in Part

Our position is that the State Statute which attempts to deny a stay pendente lite is unconstitutional and has been so held in Porter vs. Investors' Syndicate, 286 U. S. 461, 76 L. Ed. 1226. That case involved a Montana Statute (Sec. 4038 R. C. 1921) reading:

> "The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state . . . (and) pending any such action the said findings or decision of said Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

The Court speaking of that section said:

> "We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code of Civil Procedure. But it is said that the succeeding clause precludes such a remedy. The argument is that the words 'pending any such action' mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word 'pending' has the significance of 'until', or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean

that unless and until a person affected brings his action he may not disregard the order."

The court then went on to say that unless the Statute were so construed as to give the right to a stay during the continuance of the action it would be unconstitutional. It said:

"We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. Bratton v. Chandler, 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional."

Counsel for appellant contend that this decision is not applicable and controlling.

Their first contention on this point is that the Porter case is different from this because under the statutes involved in that case the state court in reviewing an order of the commissioner exercises legislative functions whereas reviews of rate orders under state statutes in Montana are judicial in character.

We think this is a distinction without a difference. The reason why the court declared such a statute unconstitutional was because of the harm that might result to interested parties if the order is effective pendente lite.

This is pointed out in the opinion of the court wherein it is stated:

"It would be strange, indeed, if the Commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed."

Where the review is judicial the Court must either affirm or revoke the order under review. Where it is legislative the Court may modify the order.

Obviously, a harmful order passing under judicial review does more harm if effective pendente lite than one passing under legislative review for as to the former the entire order must fall whereas under the latter it may only be modified to eliminate that part which is harmful.

In other words let us suppose that on a rate investigation the facts would warrant a 20% reduction in the rates but the State Commission sees fit to reduce them by 25%. On a judicial review the entire order falls. On a legislative review the order will be modified by making only the 20% reduction.

If the order in each case is effective pendente lite the harm to the utility on a judicial review would be five times greater than on the legislative review. We contend, therefore, that there is more reason for condemning a statute denying a stay in a case where an order is judicially reviewed than in a case where the review is legislative. We believe the Porter case is decisive of this, and that it squarely condemns a statute denying a stay pendente lite in a case such as this.

If such a statute is not unconstitutional then appellant has a plain, speedy and efficient remedy in the state court, notwithstanding the statute.

Before appellant is in a situation to contend that the State Statute does not provide an efficient remedy it must show that under the State Statute a constitutional right is denied. If not the remedy is efficient. If the Statute denies a constitutional right, it is invalid to that extent.

Or, in other words, the only reason why the remedy in the State Court is not efficient is because the State Statute

denies a stay pendente lite. That is a denial of due process and hence the remedy is not efficient. Porter vs. Investors' Syndicate (supra). If it is a denial of due process, it is unconstitutional. If it does not deny due process then the remedy is efficient and the Johnson Act would apply.

Counsel next contend that the Porter case is inapplicable because we have no statute expressly authorizing injunctive relief.

(C) Other Valid Statutes in Montana Authorize Stay Pendente Lite

Our position is that since that part of Sec. 3906 which denies a stay pendente lite is unconstitutional, it is as if it were not in the Statutes.

In Hamilton vs. Board of Co. Com'rs., 54 Mont. 301, 169 Pac. 729, the Supreme Court of Montana said:

> "An unconstitutional statute is void, and a void thing is as nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is as inoperative as though it had never been passed."

To the same effect are the decisions of this court. Little R. & Ft. S. Ry. vs. Worthen, 120 U. S. 97, 30 L. Ed. 588; Norton v. Shelby Co., 118 U. S. 425, 30 L. Ed. 178.

Eliminating the provisions denying a stay, there would still be left in Section 3906 the following:

> "No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon."

It may be that where confiscation is alleged to be taking place during the period required for giving notice that the requirement of a notice and hearing is also unconstitutional. But whether so or not this language clearly contemplates the right of the Court to grant a stay. If all other restrictions in the statute must fall for want of due process, there is still left in Section 3906 the clear legislative purpose to vest the State Court with power to grant an injunction staying the operation of rate orders. We have in addition Sections 9243 et. seq. R. C. M. 1921 referred to and relied upon in the Porter case that have equal application here.

(D) Consideration of Appellants' Contentions

Under Sub-division (c) commencing on page 26 of Appellants' Brief appears this quotation from the Porter case:

> "But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68 L. Ed. 975, 980, 981, 44 S. Ct. 553) or the decisions of the State Court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 553) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of Federal jurisdiction exist recourse to a Federal court of equity is justified."

We agree entirely with that statement. That case was decided in 1932 and at that time recourse to the Federal Court was permissible. Federal and state courts at that time had concurrent jurisdiction, when there was diversity of citizenship or a Federal question was involved.

The Johnson Act changed that rule as of May 14, 1934.

Counsel on page 27 of their brief suggest that there may be some question as to what the Supreme Court of Montana might say on the question of the validity of Section 3906.

A good way to find out is to present the question to that Court. State District Courts treat Section 3906 insofar as it denies a stay as unconstitutional and grant restraining orders pendente lite and do so ex parte and without notice or hearing even when confiscation is not alleged during the period necessary to give notice.

This was done in a case arising in Park County, Montana. In no case has a stay pendente lite been sought and denied in the State Court.

It is suggested on page 27 of appellants' brief that the Supreme Court of Montana might hold that the legislature has power under the State Constitution to deny injunctive relief. California cases are then cited as well as two cases decided by this Court. We fail to see the applicability of these cases to the question under consideration here.

If counsel would contend that it is competent for the State Legislature to deny injunctive relief in rate cases then they are driven to the conclusion that they have an efficient remedy notwithstanding the denial of injunctive relief by the State Statutes.

That it is competent for the State Legislature to deny injunctive relief pendente lite has been exploded by the case of Pacific Tel. & Tel. Co. vs. Kuykendall, 265 U. S. 196, which we shall now consider.

(E) Consideration of Kuykendall Case

It should be remembered that the Kuykendall case was decided ten years before the Johnson Act was passed.

At the time of that decision as well as that in the Porter case there was concurrent jurisdiction in State and Federal Courts when there was diversity of citizenship or a Federal question was involved.

In the Kuykendall case the Court was asked to hold that the matter of reviewing a valuation on property of a utility was a legislative and not a judicial function and that, therefore, the action of the commission must be subjected to the court review provided for by state statute before resorting to the Federal Court. The Commission in that case contended that the Constitution of the State of Washington did not authorize the Legislature to confer legislative powers upon the courts.

The court in speaking of this contention, said:

> "It is our duty to avoid expressing an opinion on such an issue under the Constitution of Washington, in the absence of a clear decision by its highest court, if we can do so; and we think we can."

The court then discussed the Washington Statute which prevents a supersedeas when a rate under attack has been in force for more than one year. It said:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation if it finds the case to justify it."

The court then made this statement:

> "As we have declined to look into the validity of the legislative functions with which the Washington state courts are vested in the valuation sections, so we decline to examine the validity of these restraints upon those courts to grant stays in cases of rates.

> A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 296, 65 L. Ed. 638, 646, 41 Sup. Ct. Rep. 272, presents an analogous case.

It is this statement of the court that complainants rely upon here.

It is obvious that that case is not controlling here. There the contention was made that the statute denying a supersedeas was in conflict with the State Constitution. This Court in that case simply adhered to its policy of deciding Federal questions only. Whether a state statute conflicts with the State Constitution is a question which this court has always refused to consider.

But when the question arose as to whether a state statute denying a supersedeas was in conflict with the Federal Constitution as denying due process of law, the court had no hesitancy in passing upon the question and in declaring such a statute to be clearly unconstitutional.

Porter vs. Investors' Syndicate (supra).

Moreover the statement of the court must be read in conjunction with its statement that the procedure on appeal in the State Court was a part of the legislative fixing of rates.

In other words, there is justification for the presumption of the validity of a State Statute denying a stay when the reviewing court acts legislatively. There is no such justification when it acts judicially.

When the reviewing court acts legislatively it cannot declare a statute denying a stay unconstitutional.

It can do so when it acts judicially.

Hence, at the time of the Kuykendall and Porter cases, the court was correct in holding that a statute denying a stay until the legislative process is complete should be presumed valid so as to permit the Federal Courts to grant relief—they then having jurisdiction in such cases. But when the reviewing State Court acts judicially as here, it can as well determine the validity of a statute denying a stay as can the Federal Court.

And when the court has pronounced definitely on the validity of the statute as it has in the Porter case, there is no longer any necessity or excuse for relying upon presumptions.

Counsel has cited the case of Carey vs. Corporation Com., 9 Fed. Supp. 709 affirmed in 296, U. S. 452.

We agree with the decision of that case.

Under the Oklahoma Constitution and Laws the review of rate orders by the State Courts is legislative and not judicial and the Johnson Act deprives the Federal Courts of jurisdiction only where there is a judicial review by state courts as in Montana.

II.

Montana Courts Have Never Denied a Stay Pendente Lite

There is not a single ruling of the Supreme Court of Montana holding that the State Courts cannot grant injunctive relief in such cases.

True, the Supreme Court of Montana has had occasion to either quote the statute or recite its substance but never has that Court passed upon the question.

Counsel for Complainants rely upon the case of State ex rel Public Service Com. v. Great Northern Utilities, 86 Mont. 442, 284 Pac. 772, as sustaining the claim that the State Court is prohibited from issuing an injunction pendente lite. That case does not so hold.

It simply stated that the statute, in terms, so declares. In that case it appears that an action was brought in the state court and the utility "asked for an injunction pendente lite but did not urge its issuance." This was before Judge Horsky. After the injunction action was commenced the Commission commenced an action in Mandamus in the same court but before another department presided over by Judge Poorman to enforce the Commission's order. The Mandamus action was dismissed and the order of dismissal was sustained by the Supreme Court.

The court in that case said:

> "In the ordinary action challenging an order requiring a utility to lower its rates on the ground that the order is unjust and unreasonable, the only question presented on application for mandamus to enforce the rates pending final determination would be as to the constitutionality of the statute authorizing such enforcement. * * * As the question of the constitutionality of the statute prohibiting injunction and authorizing mandamus to compel obedience to the order pending final determination was properly before Judge Horsky on application for the injunction pendente lite and could be presented at any time in the action pending, * * * This question of the constitutionality of the statutes was not raised before Judge Horsky, as the utility did not urge the issu-

ance of an injunction pendente lite, and the commission could only raise the question by an application for mandamus in Judge Horsky's department in the same manner as it was raised in Judge Poorman's department."

Thus it will be seen that as late as 1930 the Supreme Court of Montana had suggested that the constitutionality of our statute denying a stay was an open question.

In the case of Billings Utilities Company vs. Pub. Serv. Com., 62 Mont. 21, the court did nothing more than to state what the statute provides.

The same is true of the case of State vs. District Ct., 53 Mont. 229, except that in this case the court construed the statute under consideration as not applicable to the kind of an order there being considered. Hence, it was unnecessary to make any comment upon the right of the court to stay the operation of a different kind of an order.

But in any case the court did not presume to pass upon the validity of the statute purporting to deny a stay.

But if by any stretch of the imagination it can be said that it has so held or intimated, then our position is that it did so before the decision in the Porter case and it would now be required to condemn the statute.

We fail to see anything in the statement of John E. Benton referred to on pages 16 and 17 of appellants' brief that is helpful in determining the question here involved.

Since reference to the debates in Congress has been made by counsel, it is well to note that a reference to the Congressional Record of the 73rd Congress 2nd Session Vol. 78, Part II, pages 1916-1917 discloses that Congress was dealing with particular reference to the Montana situation. Senator Johnson, the author of the Johnson Act,

in speaking for the bill read a lengthy letter written by the then counsel for the Board of Railroad Commissioners of Montana. The letter in part, as appears in the Congressional Record, reads:

> "We believe that as a matter of principle there exists no justification for the procedure that permits Federal judicial interference with the orders of a State administrative board until such time as adequate remedies available within the State have been exhausted. Public Utilities do not serve the public as a matter of constitutional right. The Supreme Court of the United States has affirmed the doctrine that a franchise to operate a public utility is not, like the general right to engage in lawful business, part of the liberty of a citizen. It being true that a public utility operates in a given State only by reason of a sovereign grant from the State, there appears to be no valid reason why disputes arising between the grantor of the franchise or privilege—the State—and the recipient thereof—the utility—should not be handled within the jurisdiction of the grantor, at least until the matter in controversy has been passed upon, on its merits, by the tribunal of the State having the final say, i.e., the highest appellate court. Then, if the utility is dissatisfied, it should have the right to a review of the strictly Federal question involved by the Supreme Court of the United States."

The letter then gives a review of a particular case (evidently the Great Northern Utilities case) and then proceeds:

> "This case illustrates how under present procedure the utility can play hide-and-seek with a State regulatory board. It is, as you know, the presently approved doctrine of the Supreme Court of the United States that State and Federal Courts have concurrent jurisdiction of cases of this sort and that a utility can proceed concurrently in both state and federal courts

> until a final judgment is entered in one when that judgment becomes conclusive in the other as res adjudicata. In other words, a public utility has the right to proceed concurrently in both State and Federal tribunals on questions of law involved and then it may discontinue proceedings in the tribunal where the rulings have been adverse or unfavorable. The usual grounds for abatement of an action that there is another pending between the same parties involving the same questions is of no avail nor does the doctrine of election apply. Irrespective of the annoyance and expenses that such procedure causes a State commission, the doctrine that permits it is unsound."

Other portions of the letter need not be copied here. It is of particular significance that Congress was seeking to correct a situation particularly affecting the State of Montana. The question then is did it accomplish something or did it do a useless and idle thing? Did it waste its time and the people's money in a vain attempt to remedy a particular situation? The Porter case was decided before the Johnson Bill was enacted. The members of Congress are presumed to have had knowledge of it and patterned its legislation accordingly. There is a plain, speedy and efficient remedy in the State Courts and that ends the jurisdiction in the Federal Courts.

III.

The Johnson Act Should Be Liberally Construed

The Johnson Act is not a grant of additional authority to the Federal Courts, but the object and purpose of Congress in enacting it was to deprive the Federal Courts of jurisdiction. It should be liberally construed to effectuate the Congressional purpose and object. Doubts should be

resolved against and not in favor of jurisdiction in the Federal Courts.

Oklahoma Nat. Gas Co. vs. Russell, 261 U. S. 290, 43 S. Ct. 353;
Louisville & Nashville Ry. Co. vs. Finn, 235 U. S. 601, 35 S. Ct. 146;
Cumberland Tel. & Tel. Co. vs. Louisiana Pub. Ser. Com., 260 U. S. 212, 43 S. Ct. 75.

This Court has warned against the extention of the Federal Court jurisdiction in Oklahoma Gas & Elec. Co. vs. Okla. Packing Co., 292 U. S. 386, 54 S. Ct. 732, wherein it said:

> "The three-judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended."

IV.

The Johnson Act Is Valid

While the point is not stressed it is suggested in the brief of counsel on p. 41 that the Johnson Act is unconstitutional.

There is no merit in that suggestion.

Mississippi Power & Light Co. vs. City of Jackson, 9 Fed. Supp. 564;
Levering & Garrignes Co. vs. Morrin, 71 Fed. 2d, 226;
Kline vs. Burke Const. Co., 260 U. S. 226, 67 L. Ed. 226.

In the last cited case the court said:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.
>
> Turner v. Bank of North America, 4 Dall. 6, 10; United States v. Hudson & Goodwin, 7 Cranch, 32; Sheldon v. Sill, 8 How. 441, 448; Stevenson v. Fain, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall, 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. The Assessors v. Osbornes, 9 Wall, 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun cannot well be described as a constitutional right."

V.

It may be suggested that appellees should have taken advantage of the proviso in Section 266 of the Judicial Code, U. S. C. A. Title 28, reading:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State

court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We think that since the Johnson Act deprives the Federal Courts of jurisdiction it was not incumbent upon us to in any manner recognize its jurisdiction by seeking merely a stay in the Federal Court.

Moreover, we were confronted with the definite statement in the case of Union Light, Heat and Power Co. vs. Railroad Com. of Ky., 17 Fed. 2d. 143, that if we attempted to avail ourselves of the privileges of Section 266 under the circumstances here (the restraining order having been granted) we would be in contempt of the Federal Court.

VI.

Sec. 3880 R. C. M. 1921 Does Not Aid Appellant

Our state statute does not and cannot enlarge the jurisdiction of the Federal Court. In the complaint it is alleged that the Public Service Commission may be sued in the courts of the United States by virtue of the provisions of Sec. 3880, R. C. of Montana 1921. Sec. 3880 specifies the name of the Commission as the "Public Service Commission of Montana" and provides that "in the name as above set forth, it may sue and be sued in the Courts of the State and of the United States." This statute, as shown by its wording, was merely intended to provide by what name the Commission shall sue and be sued both in State and Federal Courts. The Legislature of Montana never intended by this section to usurp the province of Congress in an attempt to define the jurisdiction of the Federal Courts.

It simply provided, in effect, that, when by law it is proper to sue the Commission in either State or Federal Court, the action may be brought against it, naming it as the "Public Service Commission of Montana."

Likewise in that name it must sue if it becomes a plaintiff or complainant.

If Sec. 3880 is open to the construction that it is an attempt to define the jurisdiction of the Federal Court it would be invalid as an attempt to interfere with powers and duties vested exclusively in Congress.

Section 3880 deals only with the name by which the Commission must be sued. Its scope is not enlarged by the enactment of the Johnson Act, or by the failure of the Legislature of Montana to change it since the passage of the Johnson Act.

Even under the Johnson Act there may be many cases wherein it is proper to sue the Commission in the Federal Court. Now, as heretofore, such an action must be brought against the Commission in its proper name as provided in Section 3880 and that is the only effect that can properly be given to Section 3880.

We respectfully contend that the lower court's decision concurred in by (5) different Judges is correct and should be affirmed.

Respectfully submitted,

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